In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1078

EDDIE JAVOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole question raised by petitioner on this motion for collateral relief is whether he was denied effective assistance of counsel and due process of law because his retained attorney was observed apparently sleeping at times during the trial.

After a jury trial with others in the United States District Court for the Central District of California, petitioner was convicted on two counts of bringing narcotic drugs into the United States contrary to law, in violation of 21 U.S.C. (1964 ed.) 174. He was sentenced to con-

current terms of five years' imprisonment.[1] The conviction was affirmed, 435 F. 2d 836, and this Court denied certiorari, 404 U.S. 864.[2]

Petitioner then instituted the present action to vacate sentence under 28 U.S.C. 2255, claiming that he had been denied effective assistance of counsel because his retained attorney had been observed apparently sleeping at times during the trial.[3] After an evidentiary hearing, the district court denied petitioner's motion, finding (Pet. App. B-1) that "petitioner was not denied his constitutional right to effective [assistance of] counsel at trial." The court of appeals affirmed *per curiam* (Pet. App. A).

The question whether petitioner's retained counsel failed to provide effective assistance due to physical weariness during trial is primarily one of fact to be determined by the district court. The trial judge observed counsel's representation of petitioner at trial and, after the present motion was filed, conducted a comprehensive hearing on the issue of counsel's physical and mental capacity at the time of trial; the trial judge's conclusion that petitioner in fact received adequate representation from his counsel was based on a close acquaintance with the facts of this

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[1] His original sentence of concurrent terms of seven years' imprisonment was subsequently reduced to five years pursuant to Rule 35, Fed.R.Crim.P.

[2] Petitioner's conviction was initially reversed by the court of appeals, but after rehearing was remanded to the district court for fact findings on the issue of the voluntariness of confessions by his co-defendants. 403 F. 2d 507. After the evidentiary hearing on remand, the district court resolved that issue in favor of the government. The court of appeals then affirmed the convictions. 435 F. 2d 836.

[3] He also raised claims with respect to search and seizure and the testimony of a government agent. These claims have been abandoned.

case and should not be disturbed if supported by substantial evidence. The court of appeals, in affirming, expressly determined that the district court's findings were supported by substantial evidence. This essentially factual question warrants no further review.

Moreover, petitioner made no objection to the effectiveness of his retained counsel at trial, even though he now alleges that his counsel's physical weariness was apparent to him at that time. Having determined to continue with retained counsel, petitioner should not now be heard to complain. As the Sixth Circuit stated in *Loukas* v. *Johnson*, 453 F. 2d 407, 408:

> Ordinarily, a defendant who retains counsel of his own selection is responsible if that counsel does not faithfully serve his interest. Any other rule would put a premium upon pretended incompetence of counsel; for, if the rule were otherwise, a lawyer with a desperate case would have only to neglect it in order to insure reversal or vacation of the conviction. * * *

Moreover, petitioner here has pointed to no specific instance of prejudice.[4]

There is no merit to the claim that petitioner was denied due process because the trial judge did not take any affirmative action when he observed petitioner's counsel apparently sleeping. There were three co-defendants at trial and much of the evidence had no relevance to petitioner; the district court expressly stated that "petitioner's

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[4] In the lower courts petitioner cited as instances of the ineffective assistance of his trial counsel the failure to move for a pretrial severance, failure to make a pretrial motion to suppress, and the untimely filing of a motion for new trial. However, the trial court found that the record did not reveal ineffective assistance of counsel on these issues or on the entire record.

counsel * * * appeared to be alert at all times when evidence was being taken which pertained to petitioner" (Pet. App. B-1).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.